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Before the
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Washington, D.C.

In the Matter of:

1987 Cable Royalty
Distribution Proceeding

CRT Docket No. 89-2-87CD
(Phase II)

REPLY FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF
BROADCAST MUSIC, INC.

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I. INTRODUCTION.

ASCAP's Proposed Findings of Fact and Conclusions of Law distort both the record in this proceeding and the economic realities of the music marketplace. This Reply addresses those distortions and points to ample grounds for the Tribunal to reject ASCAP's contentions.

In the 1978 Cable Distribution Proceeding, the Tribunal analyzed considerable evidence of the marketplace value of the BMI and ASCAP repertoires, and awarded 44.3% of the music fund to BMI and 55.7% to ASCAP (excluding SESAC's share). On appeal, the D.C. Circuit Court of Appeals specifically affirmed the Tribunal's evidentiary basis for making this determination, and found that the Tribunal's distribution criteria comported with Congressional intent, and that the awards to BMI and ASCAP were entirely reasonable.

A review of the marketplace indicia between 1978 and 1987 confirms the correctness of the Tribunal's and the Appellate Court's previous finding that there has been a continuing "convergence" in the marketplace values of the two repertoires. In total license fees, BMI's percentage has risen substantially from 1978 to 1988. In 1978, local television broadcasters paid BMI a rate of 58% of their ASCAP license fees. By 1987, that rate had increased to 70%.

A review of 1987 license rates paid by radio broadcasters, network television broadcasters, pay cable systems and basic cable systems indicates that music users in general considered access to the BMI and ASCAP repertoires in 1987 to be of comparable value, approximating more closely a one-to-one ratio than the two-to-one ratio here sought by ASCAP. Radio broadcasters paid BMI 47% of their fees in 1987; and network television broadcasters paid BMI 46% of their fees in 1987. This convergence continues today.

In view of this incontrovertible evidence alone, it is clear that there has been a "change of circumstances" in favor of BMI in the marketplace since 1978.

Indeed, by 1987 BMI has demonstrated the unsurpassed quality and use of the works in its repertoire. For example, BMI licensed the theme and background scores for the majority of the top-ranked syndicated television

programs in 1987, and ASCAP's own list of Grammy Awards reveals that only BMI has licensed in whole or in part every Grammy Song of the Year since 1981. BMI proved that it licensed the background score in over half of the domestic films released in 1987 that were scored by U.S. composers. This evidence demonstrates a convergence of the two repertoires since 1978 in the movie field. Even ASCAP's recalculation demonstrated that BMI licensed 98 and ASCAP licensed 99 of those domestic films in 1987, or virtual parity. Finally, BMI's survey of music on distant signals confirms that BMI music accounted for approximately one-half of all music in 1987.

In support of its claim to two thirds of the 1987 music fund, ASCAP has offered four special surveys purporting to demonstrate that ASCAP's repertoire was worth twice as much as BMI's repertoire to cable system operators in 1987. These surveys cannot provide any basis for the Tribunal's decision-making.

First, neither BMI nor the Tribunal can verify, validate or replicate the results of the surveys. The Tribunal is asked by ASCAP to accept as an article of faith that the survey results, and the ASCAP Distribution Survey from which they derive, are reliable. It is a cardinal rule of economic theory that, in order to be

reliable, a statistical survey must be subject to testing and validation.^{1/}

In the prehearing conference, Commissioner Agüero correctly posed the following question: "If you don't understand ... what ASCAP is trying to do in their survey, then I, on the Tribunal, without any documentation, ... how can we make any determination in the future ... as to the weight of this survey?" Tr. 47.

The following comments of Chairman Argetsinger directed to ASCAP's counsel are also illuminating:

I understand you're saying these documents simply do not exist. There are no underlying documents other than what is found in Exhibit No. 3. Of course, you said in your response, Exhibit 3, if BMI can't understand it, that's their problem. Of course, then it becomes the Tribunal's problem.

I think you're correct about weight, but I must tell you, we want as much evidence as possible, and whether we exclude this or not is another question, but I will say, as I said earlier, the weight that this is given by the Tribunal will depend upon how you present this, and it's a sort of shot across the bow -- if it isn't explained better, we will have difficulty. Tr. 51.

In discovery, ASCAP produced for BMI so-called "detail" reports in the form of printouts purporting to demonstrate how to get from "Point A" (ASCAP's input data)

1 In the prehearing conference on November 1, 1989, ASCAP's counsel stated with respect to BMI's survey, "Our problem here is, we've got to be able to see what it is that was the basis of this special survey that they did That's our problem in a nutshell, and that's, from our perspective, why we're here today." Tr. 24.

to "Point B" (the resulting abstract credits) in ASCAP's four surveys. This material was not submitted into evidence and cannot be the basis of a Tribunal decision.

In any event, it was conceded by ASCAP witness Boyle that starting from the cue sheets and the weighting rules in Exhibit No. 3, one could not verify the calculations in the printouts without access to the computer software program. Tr. 735 (Boyle). This program too has not been provided to BMI or the Tribunal, on the grounds that it is considered by ASCAP to be "confidential." Tr. 57.

In addition, the specific design of the disproportionate sample of stations in 1987 has not been revealed by ASCAP on the basis of confidentiality. The prior performance history necessary to credit appropriately all feature, background and theme works (over 80% of the total works) is unavailable. There is no way to verify the split work adjustments appearing in the surveys. Without the majority of cue sheets used by ASCAP, which also were not produced in discovery, there is no way to verify any aspect of the surveys.^{2/}

ASCAP falls back on the old canard that it has paid millions of dollars on the basis of its Distribution Survey and that, therefore, it is reliable even though it is confidential. Yet ASCAP has not distributed one dime

² By contrast, BMI provided to ASCAP all cue sheets used in the BMI survey in discovery.

based on the four special surveys presented in this proceeding.

The most fundamental error committed by ASCAP in its presentation, however, is that evidence of its distribution practices is largely irrelevant to the marketplace value of the two repertoires. ASCAP's witnesses conceded that the Distribution Survey was designed to reflect the internal competitive necessities of ASCAP in making payments to its members, and was not designed to reflect the marketplace value of the ASCAP repertoire. Tr. 679 (Boyle); Tr. 1136 (Messinger). As we will discuss later, music users considering ASCAP's distribution methods have uniformly rejected them, as has ASCAP's rate court.

In light of the foregoing, it would be error for the Tribunal to base its awards in this proceeding on the unverifiable evidence of ASCAP's four specially-prepared surveys. To the contrary, the Tribunal should make its allocation based on the undisputed, objective and verifiable evidence offered by BMI that demonstrates a convergence in the marketplace values of the BMI and ASCAP repertoires since 1978.

II. FINDINGS OF FACT.

A. Marketplace Behavior in 1987 Justifies an Equal Allocation of the Music Fund.

1. Music Users Have Uniformly Rejected ASCAP's Distribution Methods in Licensing Negotiations.

BMI asserts that an equal division of the 1987 music fund would appropriately reflect the relative marketplace value of access to the BMI and ASCAP repertoires in 1987, from the perspective of cable system operators. BMI submits respectfully that the view of music users is the correct vantage point from which to measure the relative value of the two repertoires.

The most telling evidence of how cable system operators would value the two repertoires in 1987 is the incontrovertible evidence of the actual value placed on those repertoires in the marketplace by similarly situated broadcasting and cable users of music. BMI Prop. Findings, p. 25. For example, a review of the blanket licensing fees paid by local television, network television, local radio, basic cable television and pay cable television reveals that approximately a one-to-one ratio is considered appropriate for access to the two repertoires, not the two-to-one ratio sought by ASCAP in this proceeding. BMI Prop. Findings, p. 36.^{3/}

3 In fact, one user (Nashville Network) paid BMI 55% of its music licensing fees in 1987. BMI Exhibit No. B-25R. As for ASCAP's contentions about the "package (footnote continued)

The reason that these marketplace analogies are so compelling is threefold. First, virtually all of the music on television is licensed by both BMI and ASCAP, so that all broadcasting and cable music users obtained licenses to use both repertoires in 1987. BMI Prop. Findings, p. 37. Second, both BMI and ASCAP generally license access to their repertoires on a blanket basis, not a per program or per composition basis, so that all music users considered the relative economic value of access to both repertoires. Id. Invariably they concluded that the economic value of access to both repertoires in 1987 was economically equivalent. Finally, these numbers are actual, incontrovertible evidence which, unlike ASCAP's surveys, cannot be distorted or manipulated by ASCAP.

ASCAP protests that this marketplace evidence would have been irrelevant to cable system operators in 1987. ASCAP Prop. Findings, p. 37. ASCAP seeks to persuade the Tribunal that ASCAP's trumped up market share data would have succeeded in convincing cable system operators to pay

(footnote continued from previous page)

deal" relating to local television rates in 1987, see BMI Prop. Finding at pp. 28-29. ASCAP alleges that evidence of the synchronization rights payments made by film producers for individual works of music supports ASCAP's distribution methods. Sync rights licensing cannot be compared with broadcast and cable music users, who seek access to the entire repertoires of BMI and ASCAP in licensing negotiations.

ASCAP twice the amount of their payment to BMI in 1987. However, this data has been presented to all music users (Tr. 794, Boyle) and has not been deemed relevant in negotiations, and even has been rejected by ASCAP's rate court.^{4/}

ASCAP's counsel has stated that the eyes of the television industry are upon the Tribunal. Tr. 456 (opening statement). ASCAP is obviously attempting to reverse a string of setbacks in its attempt to gain an unjustified comparative advantage in marketplace negotiations (and before its rate court), by obtaining the ruling of an impartial governmental arbiter that its repertoire is worth twice as much as the BMI repertoire.

2. BMI Does Not Object to Reliable Music Use Information.

Contrary to ASCAP's claims, BMI does not object to reliable evidence of actual music use in 1987. ASCAP Prop. Findings at p. 8. BMI urges the Tribunal to reject only ASCAP's subjective surveys, on the grounds that they

4 Indeed, Showtime had rejected ASCAP's claim of a two-to-one payment ratio, and the rate court agreed. BMI Exhibit No. B-23R (In the Matter of the Application of Showtime, Civ. 13-95, S.D.N.Y., dated October 12, 1989). Basic cable services also have rejected ASCAP's claims, and the rate court has agreed. BMI Exhibit No. B-24-R (In the Matter of the Application of Turner Broadcasting System, Inc., Civ. 13-95, S.D.N.Y., dated October 12, 1989). The local radio, local television and network television industries also have rejected ASCAP's distribution methodology. For a discussion of ASCAP's contention that HBO was willing to pay ASCAP 24¢ per subscriber in 1987, see BMI Prop. Findings at p. 32.

are riddled with bias and error, and thus are unreliable as proof of ASCAP's market share in 1987.

In support of its claim to an even distribution of funds, BMI submitted the results of a survey of music use on distant signal stations in 1987, demonstrating that approximately one-half of the music duration on distant signals in 1987 was licensed by BMI. BMI Exhibits No. B-8 through B-12. BMI further submitted evidence of its predominance in theme and background scores on the top-rated syndicated programs in 1987, as ranked by the A.C. Nielsen Company. BMI Exhibit No. B-29R.^{5/} BMI also submitted uncontradicted evidence of parity in background scores in domestic movies released in 1987. BMI Exhibit No. B-6.

ASCAP cites Frank Music Corp. v. M-G-M, Inc., 886 F.2d 1545 (9th Cir. 1989) for the proposition that BMI's durational survey does not appropriately value music use on television. ASCAP Prop. Findings at p. 57. Frank Music is inapplicable here for the following reason. BMI's survey uses the time plus fees generated methodology

5 In its direct case BMI claimed that it licensed music in the top 14 syndicated shows, and ASCAP dwelled on an isolated instance in which the music licensed by BMI in a program included only the logo. ASCAP Prop. Findings at p. 48. In rebuttal, BMI demonstrated that BMI licensed the majority of both themes and background scores of the top 37 syndicated television shows, as ranked by the A.C. Nielsen Co. BMI Exhibit No. B-29R.

relied upon by the Tribunal in the past. It is intended to give the Tribunal objective evidence of the quantity of BMI music that appeared on distant signals in 1987. The valuation of that music is supplied by evidence of marketplace negotiations between music users and BMI. Thus, by demonstrating that approximately half of the music on distant signals in 1987 was licensed by BMI,^{6/} the music use information supplements and confirms the hard evidence of marketplace negotiations.

The Tribunal and the appellate courts have ruled that, in accordance with Congressional intent, marketplace considerations are paramount, as compared with the limited utility of mechanical formulas and statistical survey data. Cablevision Systems Development Co. v. Motion Picture Ass'n of America, Inc., 836 F.2d 599 (D.C. Cir.), cert. denied, 108 S. Ct. 2901 (1988); ACEMLA v. CRT, 854 F.2d 10 (2d. Cir. 1988); CBN v. CRT, 720 F.2d 1295 (D.C. Cir. 1983). BMI accordingly designed its evidence to avoid statistical bias.

BMI also included in its showing a wide array of top awards received by its affiliates in 1987. See, e.g., BMI Exhibits No. 5-RX and 6-RX. With over 32,000 copyright

6 Even applying ASCAP's purported "corrections" to the raw timings data, BMI's share of music of 41% does not support ASCAP's claim a two-to-one advantage in marketplace value. However, as will be discussed below, ASCAP's methodology in compiling the data should be rejected as yielding unreliable results.

holders and 53,000 songwriter and composer affiliates, BMI represented the largest group of composers, writers and publishers in the world in 1987. Tr. 828-29, 832 (Ahrold).

B. ASCAP's Surveys Do Not Change This Marketplace Result.

In response to overwhelming evidence justifying a finding of marketplace equivalence, ASCAP offers four surveys that are really two surveys: its local television "Distribution Survey" and a "census" of a single station, WTBS. ASCAP Prop. Findings at p. 10.

Stripped to its bare essentials, ASCAP's entire case hinges on the Tribunal's resolution of the following question: Can the ASCAP Distribution Survey serve as an accurate, impartial, verifiable and relevant basis for the Tribunal's reasoned award of two thirds of the music fund at issue in this proceeding to ASCAP? The simple answer is that it cannot. The reasons are manifold and convincing that use of the ASCAP Distribution Survey in this proceeding improperly inflates the marketplace value of ASCAP's repertoire, as opposed to BMI's repertoire.

1. The Four Surveys Are Not Verifiable.

From the outset, ASCAP has refused to provide BMI or the Tribunal access to the data necessary to verify the results of the four surveys. Tr. 1311-15 (Black). ASCAP

has refused to divulge the details of the design of its Distribution Survey on the basis of confidentiality. Tr. 1315 (Black); Tr. 690 (Boyle). ASCAP's small sample of television programming, only 30,000 hours per year,^{7/} is biased in favor of ASCAP programming because stations are disproportionately sampled on the basis of their license payments to ASCAP. ASCAP Exhibit No. 3, at p. 601.

ASCAP's witnesses have made repeated statements that ASCAP's Distribution Survey would produce results similar to BMI's distribution system. See, e.g., Tr. 1097 (opening statement of counsel). There is absolutely no record evidence to support these unfounded assertions. The BMI system uses payment formulas that cannot be compared, except superficially, with ASCAP's convoluted weighting rules. Tr. 1275 (Smith). Indeed, BMI's bonusing factors may have produced a result for "The Song from Moulin Rouge," for example, that exceeded the value of the rest of the music in the film "Moulin Rouge," of which ASCAP claims "100%" of the ownership. There is thus no record evidence to support ASCAP's claims that if BMI kept track of non-BMI works, both organizations would show a two-to-one ratio for ASCAP. These statements can only mislead the Tribunal.

7 By comparison, BMI's annual television distribution system surveys 6,000,000 hours of television programming. Tr. 990 (Smith).

ASCAP objected to BMI's request to provide the complete set of cue sheets necessary to validate the music performance results in the surveys. What few cue sheets were provided revealed that BMI background music was systematically excluded from the crediting process. BMI Exhibit No. B-19R. They revealed that ASCAP in many instances falsely claimed 100% of the music in programs in which it did not in fact license 100% of each of the works in the program. BMI Exhibit No. B-18R; Tr. 1270-71 (Smith).^{8/} The reason for ASCAP's unwillingness to part with the bulk of the cue sheets used in its surveys is now apparent: an examination of them may have permitted BMI to identify exactly how many works of BMI music were systematically ignored or improperly claimed by ASCAP in its surveys.

ASCAP makes much of the "quarterly detail," or title by title computations of credits, that it produced in discovery, but that it did not submit in evidence. ASCAP Prop. Findings at p. 17. However, it was conceded that working with the cue sheets and the weighting rules alone,

8 With respect to BMI's evidence that ASCAP has incorrectly claimed credit for BMI music in many programs that ASCAP claims to be "100% ASCAP," ASCAP contends that Mr. Smith agreed that in such a situation both parties may have proper claims to the music. ASCAP Prop. Findings at p. 16 n.8. ASCAP is misleading the Tribunal again. When questioned about this possibility, Mr. Smith clearly rejected the notion that ASCAP could assert any sort of proper claim to those programs. Tr. 1294-95 (Smith).

one could not verify the results that appeared in the printouts. Tr. 735 (Boyle). The printouts in no way provide proof of the accuracy and validity of the survey results. Rather, they merely list those results in more detail.

ASCAP's position is that the absence of verification should not be of concern to BMI or the Tribunal. ASCAP Prop. Findings at p. 54. Like the Nielsen Data, ASCAP contends, the ASCAP Distribution Survey should be accepted because millions of dollars have been distributed to ASCAP members on the basis of its results. Id. There are two significant flaws in ASCAP's contention.

First, the Nielsen Data are designed to represent the marketplace value of television programming, by demonstrating its popularity. The Nielsen Data thus are an indication of value to cable system operators. By contrast, ASCAP's Distribution Survey is not designed to reflect the marketplace value of the ASCAP repertoire, as Dr. Boyle conceded. Tr. 679 (Boyle). Second, the Nielsen Data has been accepted, more or less, by the entire television industry. By contrast, it has been shown that ASCAP's Distribution Survey is not used by and therefore is not relied on by music users.

2. The WTBS Census Is Flawed.

The WTBS census results have no relation to the music use on the other 619 distant signal stations carried in

1987. BMI Prop. Findings at p. 55. While it is useful to know that, according to the Larson Data, WTBS alone "generated" 37% of the fees at issue, that information is not dispositive of the marketplace value of WTBS to cable operators.

Only the Nielsen Data demonstrate the popularity of programming. When, at the Tribunal's request, ASCAP was asked to calculate the viewing of WTBS programs appearing on all stations other than WTBS, ASCAP found that only 13% of the total viewing on those stations was of programming that also appeared on WTBS. Written Rebuttal Testimony of Peter M. Boyle at p. 17. Thus, the WTBS program mix can only be viewed as an anomaly, selected for a census by ASCAP due largely to its unusual content of old films that contain ASCAP feature music. Tr. 631 (Boyle).^{9/}

3. ASCAP Has Misused the Nielsen Data.

ASCAP's unprecedented use of the Nielsen Data is a radical departure from prior practices that further inflates the value of feature music used in older films. BMI Prop. Findings at p. 57. By dividing Viewing Hours by quarter hours for all programming, ASCAP's Nielsen Data

9 ASCAP further inflates the impact of WTBS in its 53 Station Survey. By failing to account statistically for music in the 567 non-surveyed stations, ASCAP accorded WTBS a "weight" of 41.45% in its first survey, even though it generated only 37% of fees according to the Larson Data. ASCAP Exhibit No. 7. By comparison, BMI's survey accorded full weight to WTBS in its time plus fees generated approach.

calculations inverted the economic relationship of film and syndicated series programming. See the discussion in BMI Prop. Findings, at pp. 57 and 68, for an illustration of how ASCAP's method improperly uses the viewing data. This methodology bears no relationship to the value of such programming in the view of cable system operators, who import signals on which syndicated series predominate. Tr. 1084 (Black).

4. ASCAP's Weighting Rules Are Biased.

ASCAP's weighting rules, which weight feature music much more heavily than background and theme music, similarly skew the results of the four surveys from the point of view of the music user. ASCAP alleged that its Distribution Survey shows the same percentage of ASCAP credits in all three categories of music, feature, background and theme, so that the weighting rules in effect do not matter. ASCAP Prop. Findings at p. 12. ASCAP has submitted no proof of this claim.

In any event, the percentage of background music awarded to ASCAP by the Distribution Survey is unreliable because the vast majority of BMI background music is simply crossed off of ASCAP's cue sheets, and thus is never entered into the credit calculations. BMI Exhibit No. B-19R. ASCAP contends that this represented only a small portion of such music. ASCAP Prop. Findings at 13 n. 6. Ms. Messinger testified, however, that no BMI

background music was surveyed prior to 1980. Tr. 1144 (Messinger). BMI's review of the few cue sheets produced by ASCAP suggests that BMI background music is still largely excluded.^{10/}

ASCAP contends that the prior performance history required by the weighting rules had only a "minimal" effect on the survey results. ASCAP Prop. Findings at p. 15 n. 7. However, under the rules, prior performance history is required to determine credits for all feature, background and theme works, which accounted for 80% of the total credits. ASCAP Exhibit No. 3; BMI Exhibit No. X-2. Thus, in order to validate ASCAP's surveys, the prior performance history of the vast majority of works must be known. Id.

ASCAP contends that it credited all works equally, but it strains credulity to believe that ASCAP has prior performance data on BMI music sufficient to make a fair comparison, especially in view of Ms. Messinger's testimony that no BMI background music was surveyed prior to 1980. Tr. 1265 (Smith); Tr. 1144 (Messinger).

10 ASCAP's survey percentage for theme music is also suspect. Their claim of dominance in theme music is belied by the fact that ASCAP doubled its payment for theme music in mid-1987 for competitive reasons. Tr. 1274 (Smith) BMI Exhibit No. B-29R demonstrates that BMI dominated the theme music for the top 37 syndicated television programs in 1987. Finally, ASCAP's failure to credit the prior performance of all BMI works casts doubt on all of its figures.

ASCAP incorrectly contends that BMI agrees that feature music is worth more than background and theme music to music users. ASCAP Prop. Findings p. 15 n. 7. In fact, Mr. Smith testified that in the view of television programmers, background music was of overriding value, not feature music. Tr. 1275 (Smith).

ASCAP cites CBS v. ASCAP, 400 F. Supp. 737 (S.D.N.Y. 1975), as evidence that a music user would negotiate different payments for different uses of music. ASCAP Prop. Findings at p. 53. In fact, however, that case does not endorse ASCAP's distorted crediting mechanisms. More important, the incontrovertible evidence in this proceeding shows that CBS paid BMI 85% of its ASCAP rate in 1987, as the result of an arm's length comparison of the two repertoires, or 46% of its total fees. ASCAP thus cannot possibly cite the CBS Network fees as proof of the two-to-one advantage ASCAP seeks here.

ASCAP further cites ABKCO Music, Inc. v. Harrisongs Music, Inc., 508 F. Supp. 798 (S.D.N.Y. 1981) as proof that distribution surveys accurately capture the value of music. ASCAP Prop. Findings at p. 58. ASCAP reads this decision far too broadly. First, this case did not construe ASCAP's Distribution Survey or its abstract credits and weighting rules. In addition, BMI's radio survey (which was the subject of the decision) can be distinguished from ASCAP's convoluted Distribution Survey.

BMI's radio survey concerned only feature music, so it did not introduce biases among categories of works. Further, BMI's radio survey resulted from an unbiased logging system.^{11/}

ASCAP tries to cloak its surveys in the respectable garb of the Larson Data and Nielsen Data, but this gambit must fail. First, the Larson Data and Nielsen Data alone tell absolutely nothing about music use. Second, Ms. Messinger conceded that both types of data have been available to ASCAP for over ten years. Tr. 494 (Messinger). They can hardly constitute "changed circumstances" in the context of this proceeding.

ASCAP hides behind the Court's supervision of its weighting rules to salvage their claim of "fairness." ASCAP Prop. Findings at p. 13. It has not been demonstrated that ASCAP's court considers fairness to non-ASCAP members, or fairness to music users, but only the effect of the rules on ASCAP members.

11 Moreover, the court held that "While the BMI monitoring system provides good evidence of the disc jockeys' collective opinion as to popularity, and this may well accurately mirror the public's opinion, other factors may conceivably have influenced sales. . . . These other possible factors cause me to regard the BMI figures as 'some evidence' of popularity, but not absolutely binding on me." 508 F. Supp. at 800 n.6. By contrast, ASCAP seeks to bind the Tribunal firmly to the results of its arcane television survey, a survey that is biased in many ways and is unverifiable as well.

Indeed, the province of ASCAP's rates for music users, the principal focus of this case, lies with the rate court, and ASCAP's rate court has ruled that ASCAP's claim of a two-to-one advantage is meritless. BMI Exhibit No. B-23R.

5. ASCAP's Surveys Do Not Take Proper Account of the Syndex Royalties.

ASCAP's surveys, which promote feature music in films to the exclusion of other music, do not address the Syndex fund. It has been proven that the chief focus of program duplication concerns in 1987 involved syndicated series, not films. Tr. 1274 (Smith). ASCAP cites a filing before the FCC in which a claimant asserts without support that its movie packages have been duplicated. This claim however sheds no light on the relative extent of the economic harm caused by program duplication to series versus films. A review of all the filings in FCC GEN. Docket No. 87-24 confirms that syndicated series constitute the vast majority of duplicated programming. Thus, when the Tribunal gives consideration with regard to the Syndex royalties, it should be in favor of BMI's demonstrated predominance in syndicated series.

6. ASCAP's Attempt to "Modify" the BMI Survey Should Be Rejected.

ASCAP has attempted to convert BMI's survey to its own uses in order to mask the deep-seated infirmities in the four ASCAP surveys. ASCAP's attempt should be

rejected, for the following reasons. First, ASCAP employs an unprecedented Nielsen Data approach that awards film music twice the weight as syndicated series music, when the Viewing Hours data as traditionally used suggest that, if any weighting by popularity is appropriate, the opposite result should occur. BMI Prop. Findings at p. 68.

Second, ASCAP's purported "corrected" numbers for Night Tracks, Tom & Jerry and Bozo cannot be accepted at face value. The record demonstrates that ASCAP's tape-based claim to 68% of Night Tracks was easily refuted by evidence of the actual cue sheets for the program showing BMI's share to be 43% during the Composite Week. BMI Exhibit No. XR-3. The record further reflects that ASCAP's tape analysis of Tom & Jerry and Bozo is problematic. ASCAP seeks to place undue emphasis in this proceeding on the music content of cartoon episodes. ASCAP presented data relating to these cartoon episodes in rebuttal and due to the procedural limitations in the proceeding, BMI was deprived of the opportunity to respond to ASCAP's meritless claims. However, BMI licenses a vast amount of cartoon music on Tom & Jerry and otherwise, as suggested by the cue sheets for the Heckle & Jeckle and the Little Rascals episodes that actually aired on Tom & Jerry during the composite week, which are all BMI music. BMI Exhibits No. XR-2A, 2B and 2C.

In summary, ASCAP's attack on the BMI survey falls flat. The Tribunal should find that the BMI survey demonstrates that BMI licensed approximately half of the music duration on distant signals in 1987.

II. CONCLUSIONS OF LAW

A. ASCAP's Distribution Methods Have Been Rejected by the Music Industry in Licensing Negotiations.

ASCAP's "statistical" approach, contrary to ASCAP's representations, has not been accepted by the music industry in licensing negotiations. In fact, it has been rejected by all music users in comparing the marketplace values of the BMI and ASCAP repertories.

The proper perspective from which to judge the values of the two repertories is that of the marketplace.

Cablevision System Development Co. v. Motion Picture Ass'n of America, Inc., et al., 836 F.2d 599 (D.C. Cir.), cert. denied, Cablevision Company v. Motion Picture Association of America, Inc., et al., 108 S. Ct. 2901 (1988). The Tribunal should replicate the marketplace allocation that would have resulted from negotiations between cable system operators and BMI and ASCAP in the absence of the compulsory license. Id.

The hard evidence of marketplace value indicates that broadcast and cable music users have rejected ASCAP's approach without exception. ASCAP's rate court, which is charged with setting the marketplace value of the ASCAP

repertoire, has concluded that ASCAP's statistical data is not probative of marketplace value. In the Matter of the Application of Showtime, Civ. 13-95 (S.D.N.Y. Oct. 12, 1989), at p. 67 n. 49.

The Tribunal rejected evidence of the ASCAP Distribution Survey in the 1978 Distribution Proceeding. That decision was affirmed by the Appellate Court both as to its outcome and as to its reasoning. National Association of Broadcasters v. CRT, 675 F.2d 367 (D.C. Cir. 1982). Both the D.C. Circuit and the Second Circuit Courts of Appeals have expressly held that survey evidence of the type espoused by ASCAP is an inadequate basis for the Tribunal's decision-making. Asociacion de Compositores Editores de Musica Latinoamericana v. CRT, 854 F.2d 10 (2d Cir. 1988); Christian Broadcasting Network, Inc. v. CRT, 720 F.2d 1295 (D.C. Cir. 1983). ASCAP's approach to this proceeding is thus in direct contravention of the Tribunal's Congressional mandate. Id.

The Tribunal should conclude that the ASCAP Distribution Survey, which forms the basis for all four special surveys, does not reflect the marketplace value of ASCAP's repertoire. The Tribunal should further conclude that, even were they relevant, ASCAP's four specially-prepared surveys are so flawed and suspect that they do not present a fair picture of the performance of BMI music. Finally,

the Tribunal should conclude that ASCAP's claim that BMI's distribution system would produce similar results is without basis in law or fact.

In view of the above, ASCAP has failed to demonstrate changed circumstances in this proceeding in its favor. A finding of changed circumstances cannot be based on the combination of the Larson Data and Nielsen Data with ASCAP's music performance data.

B. The Evidence of the Licensing Marketplace Is Not Irrelevant.

The Tribunal should reject ASCAP's claim that the evidence of marketplace value attributed to the two repertoires by local television, local radio, network television, pay cable, basic cable programmers among others, is irrelevant. These music users had been presented with ASCAP's distribution methods in arm's length negotiations, the very methods upon which ASCAP bases ASCAP's entire claim before the Tribunal, and rejected its purported two-to-one ratio.

The results of these arm's length negotiations are incontrovertible proof that access to the two repertoires was equally valuable to the broadcast and cable industries in 1987.

ASCAP's claim that its biased, inaccurate statistical data would have merited a two-to-one marketplace advantage over BMI in distant signal retransmission is unreasonable

in view of all the evidence to the contrary. This evidence shows undeniable improvement in BMI's position.

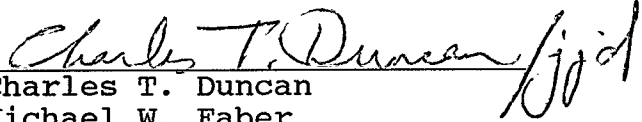
In summary, the Tribunal should reaffirm the basis for its and the Appellate Court's 1978 final determination, and should find that ASCAP has failed to offer persuasive evidence of a two-to-one advantage. ASCAP's unreliable, unverifiable and largely irrelevant survey results should be dismissed. The Tribunal should reject ASCAP's proposed findings as both a distortion of the record and as an inaccurate reflection of the economic reality of the marketplace in 1987.

III. CONCLUSION

For all of the above reasons, and for the reasons set forth in BMI's Proposed Findings of Fact and Conclusions of Law, BMI respectfully submits that it should receive no

less than 50% of the music share of the 1987 cable royalty fund.

Respectfully submitted,


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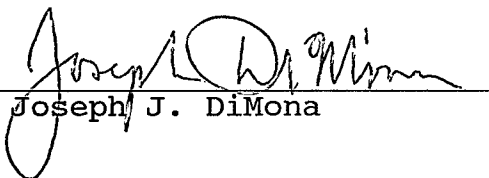
February 16, 1990

CERTIFICATE OF SERVICE

I hereby certify that a copy of the "Reply Findings of Fact and Conclusions of Law of Broadcast Music, Inc." was served on this 16th day of February, 1990 via overnight delivery to the following:

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